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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 775

C. E. EUBANKS, *Petitioner*

v.

GUY A. THOMPSON, Receiver or Trustee of the Missouri Pacific Railroad Company, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now C. E. Eubanks, the above named petitioner, and respectfully petitions this Honorable Court to grant a Writ of Certiorari to review the decision and judgment of the Supreme Court of Arkansas rendered and entered in this cause on the 12th day of January, 1948, Petition for Rehearing having been denied February 9, 1948.

Decision and Judgment of the Court Below.

The majority and dissenting opinions of the Court below are as yet unreported, and appear on pages 93 and 100 of the Record filed herewith.

Nature of Case and Summary Statement of the Matter Involved.

This is an action at law under the Federal Employer's Liability Act (Title 45, U. S. C. A., Sec. 51, et seq.; Act of April 22, 1908, C. 149, Sec. 1, 35 Stat. 65 et seq.; Act of August 11, 1939, c. 685, Sec. 1, 53 Stat. 1404) instituted by petitioner (plaintiff) against Guy A. Thompson, Receiver or Trustee of the Missouri Pacific Railroad Company, Respondent (defendant), and one Mrs. Charles Keene (defendant) to recover damages for personal injuries sustained by petitioner on November 24, 1945, while employed by Respondent railroad company as a brakeman and assisting in switching a freight train from the main line onto a side track and in "spotting" a freight car in the town of Elaine, Arkansas, in furtherance of respondent's business of interstate commerce and interstate transportation as a common carrier by railroad. When petitioner, as brakeman, and in the performance of his duties, was on the footboard on the front of the engine approaching a crossing and engaged in the "spotting" of a freight car, there was a collision between the Respondent's said locomotive and an automobile operated by Mrs. Charles Keene, a defendant in the trial court; as a result of the said collision the petitioner was caught between the locomotive and the automobile and severely injured. Suit was instituted in the Phillips County Circuit Court, Arkansas, on September 27, 1946, against the Respondent and the said Mrs. Charles Keene alleging negligence on the part of both defendants therein and demanding judgment in the sum of Seventeen Thousand ($17,000.00) Dollars.

After issue was duly joined, the case came on for trial before the Court, and the Jury, and resulted in a verdict

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and judgment in the sum of Twenty-five Hundred ($2,500.00) Dollars against the defendant, Mrs. Charles Keene, and a verdict and judgment against the Respondent (defendant) in the sum of Seventy-five Hundred ($7,500.00) Dollars. The judgment against Mrs. Charles Keene was satisfied. The Respondent Railroad Company appealed from the judgment to the Supreme Court of Arkansas, which Court reversed the judgment of the trial Court, entered on the verdict of the Jury, and ordered the cause to be dismissed against the Respondent. There was a dissenting opinion of three justices. (Record, p. 100.)

The petitioner's complaint alleged negligence against the Respondent and the defendant Mrs. Charles Keene, which negligence was alleged to be the direct and proximate cause of the collision which resulted in the injury to this petitioner. The Trial Court submitted the issues of negligence to the Jury. Both defendants were found to be negligent and a verdict was rendered accordingly. The instructions to the Jury by the Trial Court were comprehensive, emminently fair, and legally proper in all respects, (Record, pp. 70-81, inclusive), and were in strict conformity with the rulings of this Court.

Jurisdiction of the Court.

The jurisdiction of this Court is based upon Section 237 of the Judicial Code as amended and reformulated by the Act of February 13, 1925; Chapter 229, Section 1, 43 Stat. 937, Title 28, U. S. C. A., Section 344, providing that it shall be competent for this Court, by certiorari, to require that there be certified to it, for review and determination, any cause wherein a final judgment or decree has been rendered by the highest Court of a State in which a decision could be had on any title, right, privilege or immunity especially set up or claimed by either party under the Constitution, etc.; that petitioner set up and claimed, and both the Trial Court and the Supreme Court of Arkansas recognized, a right under the statutes of the United States, viz.,

the Federal Employers' Liability Act, *supra,* which right was denied petitioner by the decision of the Supreme Court of Arkansas. The jurisdiction of this Court to hear and determine cases of this nature has been invoked in many cases, a number of them being cited in the brief as a part hereof. *Ellis* v. *Union Pacific Railroad Company,* volume 91, Supreme Court Law Edition (Advance Opinions) 433, decided February 3, 1947.

Questions Presented.

1. Whether, in an action against a railroad carrier under the Federal Employers' Liability Act, to recover damages for personal injuries sustained while in the employ of the railroad carrier and performing duties in the course of his employment, the evidence relating to the proximate cause of such injuries suffice, under the applicable decisions of this Court, to warrant the submission to a Jury of the issues of negligence such as were submitted by the Trial Court in this case.

2. Whether the Supreme Court of Arkansas, in its opinion, invaded the province of the Jury on the issues of fact. as to negligence, contrary to the Federal rights created under a Federal Statute. 45 U. S. C. A., Sections 51 and 53.

3. Whether the decision of the highest Court of Arkansas, dismissing an action under the Federal Employers' Liability Act, is erroneous and not in accord with the applicable decisions of this Court, when such decision reverses the judgment in favor of the plaintiff in the Trial Court, which judgment was entered upon the Jury's verdict in favor of the plaintiff, merely because the Supreme Court of Arkansas, without the benefit of the appearance, hearing or the demeanor of the witnesses on the stand, determined that the Respondent Railroad Company did not commit such act

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of negligence under the Act, as to warrant the issue being submitted to the Jury under proper instructions.

4. Whether the decision of the Supreme Court of Arkansas was in conflict with the principles of law laid down by this Court in *Ellis* v. *Union Pacific Railroad Company, supra,* and cases there cited.

Reasons Relied for Allowance of the Writ.

1. The opinion of the Supreme Court of Arkansas is so obviously in conflict with the opinions of this Court construing and applying the Federal Employers' Liability Act as to warrant granting of the Petition for Certiorari and reversing the opinion and judgment of that Court.

2. This action was brought, and was so recognized by the Courts below, under the Federal Employers' Liability Act, *supra.* His employment by the Respondent Railroad in interstate commerce and in interstate transportation was alleged in the complaint. At the time of his injury on November 24, 1945, the petitioner was in the employ of the respondent as a brakeman, engaged in spotting a car on the passing track of the respondent railroad at Elaine, Arkansas. The salient facts and circumstances of the movement of the Respondent's engine, the collision and the injury to the petitioner are set forth in the "Summary Statement of the Matter Involved." The testimony of the petitioner and the witnesses is set forth in its entirety in the Record pages 7 to 68. Briefly the testimony showed that the engine upon which the petitioner was riding was traveling at a rate of approximately five to six miles per hour. The petitioner observed the automobile of Mrs. Charles Keene approaching the crossing from the left of the direction in which respondent's train was moving. He flagged the car down with a lantern, thought it had stopped, and he then directed his attention to another brakeman who was assisting in spotting a car. The fireman of Respondent's engine was not on the engine and in his place on the left side of the engine where

he should have been and where he could or should have seen the approaching automobile driven by Mrs. Keene. The collision occurred at the crossing and the petitioner was crushed between the automobile and the front of Respondent's engine and badly injured. There was testimony to the effect that the bell of the engine was not ringing, the whistle was not blowing, the fireman was not in his proper place, and after the collision the automobile driven by Mrs. Keene was shoved a distance of 40 to 44 feet before the Respondent's engine was brought to a stop. It was dark and the bright light of the engine was on. Mrs. Keene, and other witnesses, testified that one or more large trucks were parked alongside the tracks in such a position as to obstruct her view of the approaching engine until she was within a few feet of the crossing. Thus the question of the negligence, if any, of the respective parties was presented to the Jury which, after considering all the testimony and facts, concluded that both the driver of the automobile and the Respondent Railroad Company were guilty of negligence and that as a result of such negligence the collision occurred and the petitioner was injured. The Jury thereupon rendered a verdict for the petitioner (plaintiff) against Mrs. Keene in the sum of Twenty-five Hundred ($2,500.00) Dollars and against the Respondent Railroad Company in the sum of Seventy-five Hundred ($7,500.00) Dollars. It is clear from the record, and the applicable decisions of this Court, that the issue was for the Jury, and the Supreme Court of Arkansas was in error in ruling otherwise. Three Judges of that Court so held in a dissenting opinion (Record, p. 100).

3. On substantial evidence in this case, the issue of negligence of Respondent's engineer and fireman, (neither of whom was called to testify by the Respondent), and whether such negligence, with that of Mrs. Keene, was the proximate cause of the injury to petitioner was properly submitted for decision to the Jury.

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4. The ruling by the Supreme Court of Arkansas that the Respondent Railroad Company was not guilty of negligence is in conflict with the evidence and the applicable decisions of this Court.

5. The effect of the ruling of the Supreme Court of Arkansas was to deny the right specially set up and claimed by him under the Federal Employers' Liability Act, which right was to have his case submitted to the Jury on his claim and theory that his injury, while employed by Respondent Railroad Company in interstate commerce and in interstate transportation, resulted from the negligence of the Respondent, when there was evidence from which the Jury could rightfully come to that conclusion. Thus the ruling of the Supreme Court of Arkansas places that Court in the position of being a trier of the facts, whereas this Court stated in *Ellis* v. *Union Pacific Railroad Company, supra;*

> "The choice of conflicting versions of the way the accident happened, the decision as to which witness was telling the truth, the inferences to be drawn from uncontraverted facts, as well as contraverted facts, are questions for the Jury (citing cases). Once there is a reasonable basis in the record for concluding that there was negligence which caused the injury, it is irrelevant that fair-minded men might reach a different conclusion. For then it would be an invasion of the Jury's function for an Appellate Court to draw contrary inferences or to conclude that a different conclusion would be more reasonable. * * * And where, as here, the case turns on contraverted facts and credibility of witnesses, the case is peculiarly one for the Jury."

Prayer of Petitioners.

WHEREFORE, petitioner prays that a Writ of Certiorari be issued by the Court directed to the Supreme Court of Arkansas, to the end that the decision and judgment of that Court in this cause be reviewed by this Court, as provided by law, and that upon such review said decision and judgment be reversed, judgment for petitioner reinstated, and

that petitioner have such other and further relief as to this Court may seem proper.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No.

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v.

GUY A. THOMPSON, Receiver or Trustee of the Missouri Pacific Railroad Company, *Respondent*.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions in the Court Below.

The majority and dissenting opinions of the Supreme Court of Arkansas are unreported and will be found in the Record filed herewith at Pages 93 and 100, respectively.

Statement of the Case

The essential facts of the case are fully stated in the Petition for Writ of Certiorari and, in the interest of brevity, are not here repeated.

Specifications of Error to be Urged.

The Supreme Court of Arkansas, in its majority opinion in said cause, erred:

1. In holding and deciding that the evidence adduced at the trial of the said cause was not sufficient to make a case for the Jury, and that therefore petitioner, as a matter of law, was not entitled to recover under the Federal Employers' Liability Act as against the respondent, Guy A. Thompson, Receiver or Trustee of the Missouri Pacific Railroad Company.

2. In holding and deciding that no substantial evidence was adduced at the trial of said cause to warrant the submission of the case to the Jury on the claim and theory of the petitioner that the respondent, its agents or employees were guilty of negligence which contributed to petitioner's injuries.

3. In holding and deciding that the evidence produced at the trial was insufficient to support a finding by the Jury that petitioner's injury resulted, in whole or in part, in consequence of the negligence on the part of respondent's agents or employees.

4. In effect holding and deciding that petitioner alone was guilty of negligence and that his negligence was the sole cause of his injury, and denying him a recovery of damages under the Federal Employers' Liability Act on such ground.

5. In holding and deciding, in effect, that respondent was not chargeable with negligence because the plaintiff was guilty of negligence and assumed the risk of his injuries and in denying petitioner the right to have the Jury pass upon the theory of negligence as submitted to the Jury by the Trial Court in its instructions.

6. In reversing the judgment obtained by petitioner in the Trial Court and in dismissing the action.

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Argument.

I.

The opinion of the Supreme Court of Arkansas is so obviously in conflict with the opinions of this Court construing and applying the Federal Employers' Liability Act as to warrant granting of the Petition for Certiorari and reversing the opinion and judgment of that court.

Actions of this nature have been reviewed by this Court under the Federal Employers' Liability Act (45 U. S. C. A. sec. 51, Act of April 22, 1908, c. 149, sec. 1, 35 Stat. 65) including (U. S. C. A. sec. 53 of that Act, sec. 3, 35 Stat. 66), and (U. S. C. A. title 45, sec. 54, and the Act of August 11, 1939, c. 685, sec. 1, 53 Stat. 1404) in numerous cases. The Court has stated the rule applicable to the degree of negligence necessary in order for plaintiff to recover under this Act.

Lavender v. *Kurn*, 327 U. S. 645, 90 L. Ed. 692. Decided March 25, 1946;

Seago v. *New York Central R. Co.*, 315 U. S. 781, 62 Sup. Ct. Rep. 806; 86 L. ed. 1188;

Jenkins v. *Kurn*, 313 U. S. 256, 61 Sup. Ct. Rep. 934; 85 L. ed. 1316;

New York Central R. Co. v. *Marcone*, 281 U. S. 345;

Puget Sound Power & Light Co. v. *County of King*, 264 U. S. 22;

Tiller v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. ed. 610, 63 Sup. Ct. Rep. 232;

Bailey v. *Central Vermont R. Co.*, 319 U. S. 350, 87 L. ed. 1444, 63 Sup. Ct. Rep. 1062;

Tennant v. *Peoria & U. P. R. Co.*, 321 U. S. 29, 64 Sup. Ct. Rep. 409, 88 L. ed. 520;

Owens v. *U. P. R. Co.*, 319 U. S. 715, 63 Sup. Ct. Rep. 1271, 87 L. ed. 1683;

Blair v. *Baltimore & Ohio R. Co.*, 323 U. S. 600, 65 Sup. Ct. Rep. 545, 89 L. ed. 490;

Myers v. *Pittsburgh Coal Co.*, 233 U. S. 184, 58 L. ed. 906;

Western Atlantic R. Co. v. Hughes, 278 U. S. 496, 73 L. ed. 473;

Ellis v. *Union Pacific R. Co.*, volume 91, Supreme Court Law Edition (Advance Opinions) 433, decided February 3, 1947.

In *Tiller* v. *Atlantic Coastline R. Co., supra,* this Court said:

> "We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence.' As this Court said in facing the hazy margin between negligence and assumption of risk as involved in the Safety Appliance Act of (March 2) 1893, 45 U. S. C. A., Section 1: 'Unless great care be taken, the servant's rights will be sacrificed by simply charging him with an assumption of the risk under another name'; and no such result can be permitted here."

Owens v. *Union Pacific R. Co., supra.* In reversing the lower court (129 Fed. (2d) 1013), this Court had occasion to consider facts somewhat analogous to those in the instant case. There the Court said:

> "The purpose of this evidence apparently was twofold. The first object was to show that the company was not negligent. It sought particularly to avoid the effect of a finding that the engineer's failure to ring the bell was a violation of Rule 30 and therefore was negligence per se. But the evidence also was directed to prove that, apart from the ringing of the bell, neither Koefod nor the engineer acted negligently in assuming that Owens knew the matters sought to be proved and would remain at the switch until the cars had passed by; and therefore that they acted properly in going ahead without taking the precautions which would have been necessary if they had not been entitled to make this assumption.
>
> "The same evidence also was the basis of the company's contention that Owens assumed the risk of his injury. Although the Court of Appeals declined to determine whether it would support a legal conclusion there was no negligence, it apparently accepted the company's view that it established assumption of risk as a matter of law. * * *

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"Recently this court reviewed the 'maze of law which Congress swept into the discard' when, in August 11, 1939, it amended the Employers' Liability Act to abolish the defense of the assumption of risk. In view of the Amendment, no good purpose would be served in going over this morass again merely to dispose of this case, but we point out a few lodestars. • • •

"For, to prevail on this defense, Respondent had the burden of persuading the jury that the risk of being run down was 'so observable' that Owens was in fact aware of it and decided to chance it. Less than that, under this Statute, would be no more than contributory negligence, which cannot be interchanged or overlapped with assumption of risk as a defense. • • •

"The record shows neither such evidence of an informed and deliberate choice by Owens as would preclude a contrary verdict, nor so 'obvious' or 'apparent' a danger as would do so. • • •

"If there was negligence by the Respondent, the Statute requires something more than contributory negligence to defeat recovery, although that may minimize the damages. The jury found this issue in favor of the plaintiff, and the Court of Appeals did not purport to deal with it and did not do so unless, in the guise of finding assumption of risk, it identified the two. Since it did not deal with the question, we do not decide it. But we think it is clear that on the facts Owens' conduct amounted to no more than contributory negligence, if it was that."

II.

The trial court properly instructed the jury as to petitioner's right under the Federal Employers' Liability Act in this case.

The evidence adduced at the trial of this case on the issue of the respondent's liability for the injury of petitioner under the Federal Employers' Liability Act and for negligence on its part in failing to give proper signals or warnings, such as blowing the whistle of the engine, or ringing its bell, or by failure of the firemen to be in his proper place on the engine, which facts are set forth in the Petition

for Writ of Certiorari, and as result thereof this petitioner was injured, disclosed such acts of negligence as to justify that issue being submitted to the Jury, and its findings of fact are conclusive on that issue. *Ellis* v. *Union Pacific R. Co., supra,* and cases there cited.

III.

The Supreme Court of Arkansas erred in its conclusion that petitioner was guilty of negligence which was the sole cause of the injury.

The Trial Court's instructions to the Jury were comprehensive and properly stated the law. Particularly reference is made to the instruction contained at page 78 of the Record. There the Trial Court said:

> "You are further instructed that the effect of contributory negligence on the part of the plaintiff, if it did exist, as to his claim against Guy A Thompson, Trustee for the Missouri Pacific Railroad Company, is entirely different from the effect of contributory negligence of the plaintiff on his claim against this defendant, Mrs. Charles Keene.
>
> "In the case of Guy A. Thompson, Trustee for the Missouri Pacific Railroad Company, if you should find the company was negligent, but that the plaintiff was also guilty of contributory negligence, this would not bar a recovery against Guy A. Thompson, Trustee for the Missouri Pacific Railroad Company unless you find that the (fol. 129) negligence of plaintiff, Eubanks, was equal to or of a greater degree than that of defendant, Guy A. Thompson, Trustee, and if the negligence of plaintiff, Eubanks, be less than that of defendant, Guy A. Thompson, then the damages would be reduced by the jury in proportion to the amount of contributory negligence attributable to the plaintiff.
>
> "In the case of the defendant, Mrs. Charles Keene, any contributory negligence of the plaintiff, even though it be in the very slightest degree, would bar recovery as to her.
>
> "So, if you should find that both of the defendants were negligent, it will be necessary for you to consider the question of contributory negligence *for you to con-*

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sider the question of contributory negligence as to the two (2) defendants separately, applying the rule of reduction of damages as to Guy A. Thompson, Trustee, but considering contributory negligence as a complete bar to Mrs. Charles Keene, if you should find that contributory negligence exists, and if you find that the plaintiff was contributorily negligent, you will reduce the damages accordingly as to Guy A. Thompson, Trustee, but will find for the defendant, Mrs. Charles Keene."

In *Ellis* v. *Union Pacific R. Co., supra,* decided February 3, 1947, this Court said at page 435:

"From this evidence the jury might have concluded that petitioner had a safe place to work but elected to choose a dangerous one, that any duty of warning was fully discharged by the presence of the sign, and that the engineer had not been negligent in any way. In that view of the case the accident would be an unforeseeable, freak event or one caused solely by petitioner's own negligence. On the other hand, it would not have been unreasonable for the triers of fact to have inferred that it was proper and usual procedure to work on the right side of the engine, that the hazard was not readily apparent and was almost in the nature of a trap, that while the sign was placed so as to readily visible from a train, it was insufficient warning to a man on the ground, and that consequently petitioner was not furnished a safe place to work. And the jury might have thought that the engineer was negligent in failing to perceive the peril in time to avert the accident by a warning or by stopping the engine. Again, both parties might have been found negligent, in which event it would have been the duty of the jury, as the trial judge charged, *to render a verdict based upon the damages caused by respondent's negligence diminished by the proportion of negligence attributable to petitioner.* 45 USCA Sec. 53, 10A FCA title 45, Sec. 53."

Clearly the above quoted instruction is strikingly similar to, and in absolute accord with, the proper rule as established by this Court in *Ellis* v. *Union Pacific R. Co., supra,*

as well as many other opinions of this Court as cited herein. It is equally clear that the Supreme Court of Arkansas was in error in reversing the verdict of the Jury and the judgment entered thereon for the petitioner.

IV.

The Supreme Court of Arkansas erred in that it invaded the province of the jury on questions of contraverted facts.

Here again we cite *Ellis* v. *Union Pacific R. Co., supra,* wherein this Court said at page 436:

> "The choice of conflicting versions of the way the accident happened, the decision as to which witness was telling the truth, the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury. *Tennant* v. *Peoria & U. P. R. Co.,* 321 US 29, 88 L ed 520, 64 S Ct 409, 15 NCCA (NS) 647; *Lavender* v. *Kurn,* 327 US 645, 90 L. ed. 692, 66 S Ct 740, supra. Once there is a reasonable basis in the record for concluding that there was negligence which caused the injury, it is irrelevant that fair-minded men might reach a different conclusion. For then it would be an invasion of the jury's function for an appellate court to draw contrary inferences or to conclude that a different conclusion would be more reasonable. *Lavender* v. *Kurn, supra* (327 US p. 645, 90 L ed 692, 66 S Ct 740). And where, as here, the case turns on controverted facts and the credibility of witnesses, the case is peculiarly one for the jury. *Washington & G. R. Co.* v. *McDade,* 135 US 554, 572, 34 L ed 235, 241, 10 S Ct 1044; *Tiller* v. *Atlantic Coast Line R. Co.,* 318 US 54, 68, 87 L ed 610, 618, 63 S Ct 232, 143 ALR 967."

Conclusion.

It is apparent that the opinion of the Supreme Court of Arkansas is in direct conflict with the opinions of this Court on its construction and application of the Federal Employers' Liability Act, *supra.* The petitioner, therefore, prays that this Court issue its Writ of Certiorari herein and that

the final judgment of the Supreme Court of Arkansas rendered herein be reversed.

Respectfully submitted,

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